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REGULATORY CHECKLIST / CROSSWALK FOR CWA SECTION 404 PROGRAM ASSUMPTION

404 Program Definitions and Exemptions - 40 C.F.R. Part 232: Definitions and exemptions in 40 C.F.R. Part 232 apply to State administered programs after program approval. 40 C.F.R. § 232.1.

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A. 40 C.F.R. § 232.2 Definitions

Citation	Description	Corresponding State Authority Citation	Language of State Authority	Comments on State authority
40 CFR 232.2	<i>Discharge of Dredged Material</i>	XXX 196.800(12) XXX 196.800(7)	"Removal" means: (a) the taking of material in any waters of this state; or (b) the movement by artificial means of material within the bed of such waters, including channel relocation. "Material" means rock, gravel, sand, silt, and other inorganic substances removed from waters of this state.	
40 CFR 232.2	<i>Discharge of Fill Material</i>	XXX 196.800(3)	"Fill" means the deposit by artificial means of material at one location in any waters of this state.	
40 CFR 232.2	<i>Dredged Material</i>			
40 CFR 232.2	<i>Effluent</i>			
40 CFR 232.2	<i>Fill Material</i>			
40 CFR 232.2	<i>General Permit</i>		CURRENTLY: "General permit" means a permit for removal activities or fill activities that are substantially similar in nature, are recurring or	Concept amends the current definition and amends standards for issuing general

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			<p>ongoing, and have predictable effects and outcomes.</p> <p>PROPOSED CONCEPT: "General permit" means a permit developed pursuant to XXX-196.817 that is issued:--(a) On a statewide or geographical basis; or (b) For removal activities or fill activities that are substantially similar in nature, are recurring or ongoing, and have predictable effects and outcomes.</p> <p>(1)(a) Notwithstanding XXX-196.810, the Department of State Lands may establish a removal or fill general permit:</p> <p>.....(A) By rule for processing applications on a statewide or geographic basis; or</p> <p>.....(B) By order for an applicant or group of applicants to cover activities that are substantially similar in nature, are recurring or ongoing, and have predictable effects and outcomes.</p> <p>.....(b) The department must find that the project is in compliance with the review standards set forth in..... the project will cause only minimal adverse environmental effects when performed separately and will have only minimal cumulative adverse effects on the environment.</p> <p>.....(c) The department shall condition any such general permit upon actions necessary to minimize environmental effects.</p>	<p>permits:</p>
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B. 40 C.F.R. §232.3 Exemptions

Citation	Description	Corresponding State Authority	Description	Comments on State authority
40 CFR 232.3(b)	Exemptions Recapture Provision		Exemptions in (2) to (6) and (8) do not apply if...	
40 CFR 232.3(c)(1)	Agricultural (farming, silvicultural, and ranching activities)		"plowing" includes... "seeding" means... "harvesting" means...	Note: the exemption for "subsurface drainage, by deep ripping, tiling or moling, on converted wetlands, is deleted in the version of XXX 196-90S that will take effect upon assumption.
40 CFR 232.3(c)(2)	Maintenance of Currently Serviceable Structures and Transportation Structures			
40 CFR 232.3(c)(3)	Construction or maintenance of farm or stock ponds or irrigation ditches or the maintenance (but not construction) of drainage ditches			
40 CFR 232.3(c)(4)	Construction of temporary sedimentation basins on a construction site		Artificially created wetlands and ponds are not waters of the state unless they are equal or greater than 1 acre; created, in part or in whole, in waters of the state; or identified in an authorization as a mitigation	

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	<i>which does not include placement of fill material into waters of the United States; also applies to basins used in land-disturbing excavation activities such as quarrying and other mining</i>		site.	
40 CFR 232.3(c)(6)	<i>Construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment</i>		Exempts fill/removal activities for maintenance of farm roads that are constructed and maintained in accordance with construction practices designed to minimize any adverse effects to the aquatic environment. Exempts fill/removal activities for the maintenance of access roads constructed to move mining equipment, if:	
40 CFR 232.3(d)	<i>Definitions for Agricultural Exemptions</i> <ul style="list-style-type: none">• <i>Cultivating</i>• <i>Harvesting</i>• <i>Minor drainage</i>• <i>Plowing</i>• <i>Seeding</i>		"Cultivating" is not defined. "converted wetlands" means. "harvesting" means. "Minor drainage" is not defined. "plowing" includes all forms of primary tillage, including moldboard, chisel or wide-blade plowing, disking, harrowing or similar means of breaking up, cutting, . . . "seeding" means . . .	

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II. 404 State Program Regulations - 40 C.F.R. Part 233:

A. 40 C.F.R. Part 233, Subpart C – Permit Requirements

Citation	Description	Corresponding State	Description	Comments on State
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		Authority		authority
40 CFR 230.5	Sequenced guidelines for evaluating permits		Two determinations are made based on the information gathered by considering nine criteria.	State does not specifically sequence its decision making; however, it does gather and analyze information then make two ultimate determinations.

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B. 40 C.F.R. Part 233, Subpart D – Program Operation

Citation	Description	Corresponding State Authority	Description	Comments on State authority
40 CFR 233.30	Outlines requirements of a complete application.		<p>“Completed application” means a signed permit application form that contains all necessary information for the director to determine whether to issue a permit, including: a map showing the project site.....</p> <p>Rule provides application requirements for individual permits; supplements statutory list of requirements for a “completed application” including that the level of detail may vary. List is too long for this crosswalk. Rule provides procedures regarding completeness determinations.</p> <p>“Independent utility” means that..... “Project” means the primary</p>	<p>Department of State Lands (DSL) uses the same application form that the Corps uses in State. Application form includes a certification.</p>
40 CFR 233.31	If proposed discharge may affect integrity of waters of any other states other than the state in which the discharge occurs, Director shall provide an opportunity for such State(s) to submit written comments. Reason for not accepting these recommendations must be submitted to EPA for approval		<p>Notification that completed application is available for review is delivered to list of entities including state agencies “in the geographic area affected by the permit”.</p>	<p>State could amend XXX 196.825 to allow DSL to seek EPA approval to reject a recommendation from a state affected by the permit. This is not yet in the LConcept for 2013.</p>

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40 CFR 233.32	Outlines the applicability, timing, method, and content of public notices		<p>The director may request comment from interested parties and adjacent property owners on any application for a permit.</p> <p>For linear facilities, notice is to be sent to landowner of site specified in application and all adjacent landowners.</p> <p>At its discretion, DSL may circulate proposed project modifications for public review; situations where it may be necessary include those that would result in an increase in adverse impacts or those that involve significant changes in operating conditions.</p> <p>Notice of public comment period is sent to adjacent property owners, watershed councils, public interest groups, affected local government land use planning departments, state agencies, and federal agencies and tribal governments in the geographic area affected by the permit. Notice is sent by US mail or electronically (e.g., fax, email, posting on the Internet).</p> <p>Public comment period is 30 calendar days from the date of the notice, except DEQ shall have 75 calendar days if the application requires</p> <p>If applicant modifies application, DSL may circulate the revised application again for public review;</p> <p>DSL may establish general permits by rule for processing applications on a statewide or geographic basis, or by order for an applicant or group of ..</p> <p>General permits are promulgated as administrative rules.</p>	<p>DSL may promulgate rule regarding public comment period for emergency authorizations.</p> <p>See section regarding General Permits for additional information, including information about the LC concept for 2013.</p>
40 CFR 233.33	A public hearing shall be held whenever the Director determines there is a significant		At DSL's discretion, DSL may hold a public hearing to gather necessary information that may not otherwise be available to make a decision.

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	degree of public interest in the application. Any interested person may request a public hearing.			
40 CFR 233.34	<u>In making the decision on applications, Director shall review for compliance with 404(b)(1) guidelines, shall consider all comments received and make those comments a part of the official record on the application, and shall prepare a written determination on each application outlining his decision and rationale. This record is open to the public.</u>			

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40 CFR 233.34	In making the decision on applications, Director shall review for compliance with 404(b)(1) guidelines; shall consider all comments received and make those comments a part of the official record on the application; and shall prepare a written determination on each application outlining his decision and rationale. This record is open to the public		DSL shall issue a permit if applied for, if the director determines that the project described in the application is consistent with the..... In determining whether to issue a permit in an area that is not subject to an approved wetland conservation plan, the director will consider nine criteria: Consider the public need for the proposed fill or removal and the social, economic or other public benefits likely to result from the proposed fill or removal; may rely on findings of a public body. Consider the economic cost to the public if the proposed fill or removal is not accomplished. Consider the availability of alternatives to the project for which the fill or removal is proposed. Consider the availability of alternative sites for the proposed fill or removal. Consider whether the proposed fill or removal conforms to sound policies of conservation and would not interfere with public health and safety. Consider whether the proposed fill or removal is..... State Public Records Act allows any person to inspect any public records in the custody of DSL, with specified exemptions. DSL will issue written findings in the following circumstances: permit denial; fill of two acres or more in wetlands; fill in estuaries..... DSL will review and consider substantive comments received during the public review period, and..... In considering applications for permits, DSL may cause investigations or surveys to be made.....	DSL may also issue findings in other circumstances.	Formatted Table
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40 CFR 233.36	With conditions, Director may reevaluate the circumstances and conditions of a permit on his own motion or at the request of a third party, if he believes sufficient cause exist.		If the Director finds that individual is acting contrary to conditions..... Failure to provide complete and accurate information in the application may be grounds for..... DSL may suspend or revoke an authorization if..... Procedures to revoke or suspend an authorization include notice..... If a person fails to comply with reporting requirements or any other condition of a multi-year authorization..... DSL may require an individual permit, rather than issue an authorization to use a general permit;..... DSL may modify a permit at any time upon request of permit holder to address changes..... Authorizations are issued to the applicant;	Individual Permit Form includes a condition that DSL may temporarily halt or modify the project in case of unforeseen damage to natural resources.
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C. 40 C.F.R. Part 233, Subpart E – Compliance and Enforcement

Citation	Description	Corresponding State Authority	Description	Comments on State authority
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40 CFR 233.40	State shall maintain program designed to identify persons who have violated law in the past. Director and State officers shall have authority to enter site in order to copy records, inspect, monitor, or investigate compliance, and shall conduct these inspections in a manner that will produce evidence admissible in an enforcement proceeding. State shall also maintain a program for receiving and ensuring consideration of publically submitted information about violations		If Director determines that material is being removed from or filling is occurring in any of the waters of the state without a permit, or in a manner contrary to Alleged or suspected violations may be reported as complaints to DSL in person, by email,	L Concept 2013 could seek clarification that: enforcement tools are available to determine compliance or noncompliance; clarify authority to inspect and copy records and to collect and test samples; and for processing publicly submitted information.
40 CFR 233.41	State shall have authority to restrain, sue to enjoin any threatened or continuing violation, and assess or sue to recover civil penalties and seek criminal remedies.		Director may enter an order requiring any person to cease and desist from any violation Enforcement powers include authority to enjoin violations of through civil abatement proceedings. Enforcement actions summarized, including If the Director finds that individual is acting contrary to conditions set out in permit, director may revoke, suspend, or refuse to renew such permit. DSL may suspend or revoke an authorization if an alleged violator Person commits offense of unlawful removal from or	L Concept for 2013 will change the mens rea to "willfully or as the result of ordinary negligence"; clarifies that it applies to permits and any other type of authorization. Criminal fines are not available for fals

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			<p>filling of waters of this state if the person knowingly violates.....he offense is punishable by a fine of up to \$10,000 per day of violation.</p> <p>Allows for double or treble damages for destruction of public right of navigation, fishery, or recreation.</p> <p>Costs and attorney fees.....</p> <p>Any person who violates XXX-196.600 to 196.905 OR statute XX or any rule, order or permit shall be subject to a civil penalty in an amount determined by the Director of not more than \$10,000 per day of violation.</p> <p>A violation is:</p> <p>Schedule of civil penalties and factors to be considered in imposing civil penalties.</p> <p>Civil penalties may be assessed for each violation and for each day of each violation..... public interest in deterring future violations..... may settle violations and penalties in the exercise of its discretion taking into account the cooperation of the violator in addressing the violation.</p>	<p>statements, representations or certifications; or tampering with monitoring devices.</p>
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D. 40 C.F.R. Part 233, Subpart F – Federal Oversight

Citation	Description	Corresponding State Authority	Description	Comments on State authority
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40 CFR 233.50	Director shall transmit a copy of the public notice, draft general permits, notice of significant action taken by the State agency, every issued permit, and Directors response to another State's comments to the Regional Administrator. Unless waived, Administrator shall provide copy of each notice to Corps, FWS, and NMFS for comment. Objections by these agencies, and ultimately EPA, must be resolved before any permit is issued.			State could amend XXX 196.825 to allow time for EPA review, and to require EPA approval in specified circumstances. This is not yet in the LConcept for 2013.
40 CFR 233.51	With several exceptions ¹ , the Regional Administrator shall specify the categories of discharges for which the EPA will waive Federal Review of State permit applications. Administrator retains right to terminate any waiver.			
40 CFR 233.52	The Director shall		In performing a duty imposed upon it, in exercising a	DSL may enter MOA/MOU

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	submit an annual report to the Administrator evaluating the States administration of its program and identifying problems and recommending solutions. After period of public comment, report will be finalized and publically available.		power conferred upon it or in administering a policy or program delegated to it.....	with EPA that provides direction.....
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III. **404(b) (1) Guidelines - 40 C.F.R. Part 230:** States must have the authority to issue permits that assure compliance with the 404(b)(1) guidelines.

A. **40 C.F.R. Part 230, Subpart B - Compliance with the Guidelines**

Citation	Description	Corresponding State Authority	Description	Comments on State authority
40 CFR 230.10	No discharge permitted if (1) practical alternatives with less adverse impacts exist (2) causes or contributes to water quality degradation, (3) jeopardizes any listed species or results in adverse habitat modification, (4)			

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	appropriate and practicable steps to minimize adverse impacts have not been taken			
404(b)(1)	<i>Authority for the 404(b)(1) guidelines; used to specify disposal sites; where 404(b)(1) guidelines would prohibit designation of site, also consider the economic impact of the site on navigation and anchorage.</i>			
33 CFR 320.4(b)(4)	<i>No permit shall be issued which alters wetlands identified as important unless the benefits of proposed alteration outweigh the damage to the wetland resource. Decide by applying 404(b)(1) guidelines, specifically 40 CFR 230.10(a)(1), (2) and (3) which address the analysis of practical alternatives.</i>			

B. 40 C.F.R. Part 230, Subpart C – Potential Impacts on Physical and Chemical Characteristics of the Aquatic Ecosystem

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Citation	Description	Corresponding State Authority	Description	Comments on State authority
40 CFR 230.20-230.25	List of potential impacts to aquatic ecosystem including changed substrate, suspended particulates/turbidity, water chemistry, current patterns and water circulation, water fluctuations, salinity gradients; list is used in determining compliance with 404(b)(1) under 40 CFR 230, Subpart B.,			

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C. 40 C.F.R. Part 230, Subpart D – Potential Impacts on Biological Characteristics of the Aquatic System

Citation	Description	Corresponding State Authority	Description	Comments on State authority
40 CFR 230.3-230.32	List of potential impacts to biology in aquatic ecosystem including harm to endangered species and habitat, populations of fish, crustaceans, mollusks and other food web organisms, and the loss			

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	or change of breeding or nesting areas, escape cover, travel corridors, and preferred food sources for resident and transient wildlife species; list is used in determining compliance with 404(b)(1) under 40 CFR 230, Subpart B..
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D. 40 C.F.R. Part 233, Subpart E – Potential Impacts on Special Aquatic Sites

Citation	Description	Corresponding State Authority	Description	Comments on State authority
40 CFR 230.40 - 230.45	List of potential impacts to Special Aquatic Sites including sanctuaries and refuges, wetlands, mud flats, vegetated shallows, coral reefs, and riffle or pool complexes; list is used in determining compliance with 404(b)(1) under 40 CFR 230, Subpart B.	XXX-141-085-0510(40)	Eleven legislative findings regarding wetlands, including: wetlands provide a natural means of flood and storm damage protection; wetlands provide essential habitats for ... management is a matter of state concern. "Functions and values" defined. "Functions" are ... In determining whether to issue a permit in an area that is subject to an approved wetland conservation plan; Permits may be issued in estuaries for nonwater dependent use only if Application must include a written analysis of the potential changes that the project may make to For projects where impacts to wetlands or tidal waters cannot be avoided, compensatory wetland or tidal	Note: Wetland Conservation Plans are submitted, reviewed, and potentially approved pursuant to XXX 196.678 through 196.684.

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E. 40 C.F.R. Part 233, Subpart F – Potential Effects on Human Use Characteristics

Citation	Description	Corresponding State Authority	Description	Comments on State authority
40 CFR 230.50-230.54	List of potential impacts to human use characteristics including municipal and private water supplies, recreational and commercial fisheries, water-related recreation, aesthetics, and parks, monuments and preserves; list is used in determining compliance with 404(b)(1) under 40 CFR 230, Subpart B.		Statement of Policy includes: Streams, lakes, bays, estuaries and other bodies of water in this state. Permit will be issued if the project described in the application is consistent with protection, conservation and best use of the water resources of this state as specified in .	

F. 40 C.F.R. Part 233, Subpart G – Evaluation and Testing

Citation	Description	Corresponding State Authority	Description	Comments on State authority
40 CFR 230.60-230.61	Provides information to reach determinations required by 230.11			

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G. 40 C.F.R. Part 233, Subpart H – Actions to Minimize Adverse Effects

Citation	Description	Corresponding State Authority	Description	Comments on State authority
40 CFR 230.70-230.77	Provides list of actions which can be undertaken to minimize the adverse effects of discharges of dredged or fill material		The Director may impose conditions. If the director issues a permit, the director may impose such conditions as the director considers necessary to carry out the purposes of XXX-196. In determining whether to issue a permit in an area that is subject to an approved wetland conservation plan, the director will determine whether the permit would be consistent with the wetland conservation plan or could be conditioned to be consistent with the plan.	Note: Wetland Conservation Plans are submitted, reviewed, and potentially approved pursuant to XXX-196.678 through 196.684.

H. 40 C.F.R. Part 233, Subpart I – Planning to Shorten Permit Processing Time

Citation	Description	Corresponding State Authority	Description	Comments on State authority
40 CFR 230.80	In order to streamline permit process times, EPA may identify possible future disposal sites and areas unsuitable for disposal site specification.			

I. 40 C.F.R. Part 233, Subpart J – Compensatory Mitigation for Losses of Aquatic Resources

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Citation	Description	Corresponding State Authority	Description	Comments on State authority
40 CFR 230.91	Purpose of Subpart J is to establish criteria for compensatory mitigation to offset unavoidable impacts to waters of the US.		Purpose of State's mitigation-related statutes is to:	

IV. Corps of Engineers 404 Program Regulations: 33 C.F.R. Parts 320, 321, 322, 323, 325, 326, 328, 329, 330 and 332:

Citation	Description	If applicable, Corresponding State Authority Citation	If applicable, Language of State Authority	Comments on State authority
33 CFR § 320.3(n)	<i>General Regulatory Policies – Relationship to Section 402 permits.</i> Informational ; a COE function that will remain with the COE– Under Section 402(b)(6) - no NPDES permit will be issued if the Chief of Engineers if navigation and anchorage will be substantially impaired.			
33 CFR §320.4	<i>General Policies for evaluating permit applications –</i> Informational ; explains the type of review the COE goes through with citation to other applicable statutes.			

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33 CFR §320.4(d)	<i>Water Quality</i> - Applications will be evaluated for compliance with applicable water quality standards and effluent limits both during construction and subsequent operation of the proposed activity. The evaluation should include both point and non-point sources, noting that NPS control is assigned to the states.			
33 CFR Part 321	<i>Permits for Dams and Dikes in Navigable Waters of the US – Informational</i> ; notes that in addition to Section 9 Rivers and Harbors Act permits, Section 404 permits are also required.			
33 CFR Part 322	<i>Permits for Structures or Work in or affecting Navigable WOTUS – Informational</i> ; notes authorization of certain structures under Section 10 RHA require Section 404 permits.			
33 CFR §322.3(c)	<i>Activities Requiring Permits: Activities of Federal Agencies – Informational</i> ; describes the requirements for federal agencies to get authorization for activities in Navigable WUS.			

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33 CFR Part 323	<i>Permits for discharges of dredged or fill material in to WOTUS</i> – This section includes the COE definitions, the list of activities requiring permits and the exemptions from needing permits, which are the same as the EPA definition.			
33 CFR §323.5	<i>Program Transfer to the States</i> – Informational describes the transfer of the program under 404(h), and the procedures for transfer.			
33 CFR Part 325	<i>Processing of Department of Army Permits</i> – Describes the step by step process for processing DA permits including contents of application, public notices, conditions among other requirements. Some of these provisions are informational, some are requirements when needed for consistency.			
33 CFR Part 326	<i>Enforcement</i> – Describes the requirements of an enforcement program for permit violations.			
33 CFR Parts 328 and 329	<i>Definitions of WOTUS and Navigable Waters</i> – Informational Just to show where these are in the COE regs.			

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33 CFR Part 330	<i>Nationwide Permit Program</i> Informational			
33 CFR Part 332	<i>Compensatory Mitigation for Losses of Aquatic Resources</i> – The Mitigation Rule			

40 CFR 233.51(b) With the following exceptions, any category of discharge is eligible for consideration for waiver: (1) Draft general permits; (2) Discharges with reasonable potential for affecting endangered or threatened species as determined by FWS; (3) Discharges with reasonable potential for adverse impacts on waters of another State; (4) Discharges known or suspected to contain toxic pollutants in toxic amounts (section 101(a)(3) of the Act) or hazardous substances in reportable quantities (section 311 of the Act); (5) Discharges located in proximity of a public water supply intake; (6) Discharges within critical areas established under State or Federal law, including but not limited to National and State parks, fish and wildlife sanctuaries and refuges, National and historical monuments, wilderness areas and preserves, sites identified or proposed under the National Historic Preservation Act, and components of the National Wild and Scenic Rivers System.